IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Thomas M. Smither, respectfully shows to this Honorable Court:

I

Summary Statement of the Matter Involved

This is an action brought in the Court of Claims of the United States, to obtain just compensation for 157.59 acres of land, taken by the United States without due process of

law and without compensation therefor; the decision of said Court in this case is based entirely upon the transcript of the evidence, which evidence the Court never heard, and upon the report of a Commissioner of said Court, who did not preside at any hearing, neither heard nor took any testimony in this case, and who predicated his report solely upon the transcript of the evidence on file in said Court, which evidence was presented in a hearing held before another Commissioner of said Court, nearly one year before the filing of said report. This case was, by order of the Court of Claims, originally referred to Commissioner Raymond T. Nagle of said Court, on June 23, 1948, with instructions to take testimony and make a report of the facts to the Court. Commissioner Nagle, however, did not make his report of the findings of fact to the Court, although he had presided at the hearing in San Francisco, California, on March 7 to March 9, 1949, where testimony was taken and evidence presented, at which hearing the later appointed Commissioner Foster, whose report was used in arriving at the decision herein, was not present. Commissioner Nagle presided at a supplemental hearing held in San Francisco on October 25, 1949, and received requests for findings of fact from plaintiff on December 16, 1949, and from defendant on January 24, 1950. Commissioner Nagle was removed from this case, before he had made his report, by order of the Court of Claims,[1] which order is herewith quoted in full:

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[1] A request that this order be included in the certified transcript of the record in this case, as part of the record as is material to the errors assigned, in accordance with the Act of Congress of May 22, 1939 (53 Stat. 752), section (a) of Rule 99 of the Court of Claims, and rule 41 of the rules of this Court, was made to the clerk of said Court of Claims, but said request was neither accepted nor filed by said clerk.

"COURT OF CLAIMS OF THE UNITED STATES

No. 48650

THOMAS M. SMITHER

v.

THE UNITED STATES

ORDER

It Is Ordered by the Court this 3rd day of February, 1950 that this case be and it is hereby referred to George H. Foster, one of the commissioners of this court, for an ascertainment and report of the facts to the court.

The commissioner shall ascertain whether both parties have closed their proof; and if not, shall notify either or both of them to produce witnesses or evidence within such reasonable time as he may prescribe. Where deemed necessary by him the commissioner shall have the witnesses summoned. He shall fix the time and place for the taking of testimony, giving notice to either side thereof; and having concluded the taking of testimony he shall make a report of the facts to the court, filing with his report the evidence adduced by the parties. In the event both parties have concluded the taking of testimony at the time of this reference the commissioner shall proceed to ascertain the facts from the evidence on file, making his report, as already stated. Upon the filing of the commissioner's report the clerk shall mail notice to the parties of the filing of the same.

Each party may have 30 days from the date of the filing of the commissioner's report to file printed exceptions thereto. Each exception, at the end thereof, shall have appropriate references to the parts of the record relied upon for its support. The plaintiff may have 15 additional days from the date of the filing of his exceptions, or a total of 45 days, within which to

file brief, and the defendant may have 30 days after the date on which plaintiff's brief is filed within which to file its brief.

The commissioner may rule upon the relevancy and admissibility of any evidence, any exceptions by either party to his rulings to be noted at the hearing by him.

All other questions are reserved.

It Is Further Ordered that the former order referring this case to Commissioner Nagle be and the same is vacated and set aside.

By the Court:

MARVIN JONES,
Chief Judge."

No explanation why this order was issued by said Court of Claims, was given to your petitioner.

The report of the new Commissioner Foster, so appointed for the first time, on February 3, 1950, was filed on February 16, 1950, and is predicated solely upon the transcript of the evidence presented in the hearing held before Commissioner Nagle, on March 7 to March 9, 1949, at which hearing Commissioner Foster was not present. Your petitioner excepted to this report of Commissioner Foster on March 17, 1950, which exception was totally disregarded by the Court of Claims. Briefs were filed and the Court of Claims rendered its decision on July 10, 1950, which decision is based upon said report of Commissioner Foster and upon the transcript of the evidence presented before Commissioner Nagle, which evidence neither Commissioner Foster nor said Court ever heard. A motion for a new trial was filed on July 30, 1950, on the grounds that Commissioner Foster did not have jurisdiction to make the report of the findings of fact, for the reason that he never heard the evidence, never saw the witnesses, and was totally unable to pass upon their credibility, and that the decision herein was, therefore, made without due process of law. This motion was overruled by the Court of Claims on October 2, 1950.

II

Grounds On Which Jurisdiction of This Court Is Invoked

The provision of the Fifth Amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

III

Questions Involved

1. Is not a decision rendered by the Court of Claims on the basis of a transcript of the evidence, which evidence said Court never heard, and upon the report of the findings of fact made by a commissioner of said Court, who fixed no time nor place for taking testimony, who heard no evidence, who saw no witnesses and who concluded no taking of testimony, but based his report solely upon the transcript of the evidence taken before another commissioner of said Court in a hearing at which the commissioner making said report was not present, contrary to the provision of the Fifth Amendment to the Constitution of the United States, forbidding the taking of property without due process of law?

2. Whether, even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the neglect to ascribe a special value for reservoir use to land taken by the United States, where the transcript of the evidence shows that said land is particularly suitable for such use, and there is a proven and admitted possibility and a reasonable probability that the land could and might be used for such purposes by other agencies than the United States Government, is in conflict with the principle of just compensation as set forth in decisions of this Court?

3. Whether, even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the neglect to ascribe an enhanced value to land taken by the United States, lying outside of the fixed boundary line of a reservoir project, as authorized and defined by Congress, where the transcript of the evidence shows that said land was taken more than eight years after the Act of Congress authorizing said project and defining the boundary thereof had been enacted, during which time said land had acquired a special value for recreational and resort purposes, is in conflict with the principle of just compensation as set forth in decisions of this Court?

IV

Reasons Relied On for the Allowance of the Writ

1. The Court of Claims of the United States has rendered a decision in violation of the due process of law provision of the Fifth Amendment to the Constitution of the United States.

2. In rendering its decision the Court of Claims of the United States, erroneously decided questions arising under said Fifth Amendment to the Constitution of the United States adversely to petitioner's contentions, and it is believed, contrary to the decisions of this Court, and to the purpose and intent of Congress.

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States should be granted.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF OF PETITIONER

I

Grounds On Which Jurisdiction of This Court Is Invoked

The provision of the Fifth Amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

II

Statement of the Case

This action was brought in the Court of Claims on April 30, 1948, to recover just compensation from the United

States, for the taking of 157.59 acres of land lying partly inside of and partly outside of the fixed boundary line of the reservoir created by the Shasta Dam, of the Central Valley project of the Bureau of Reclamation, United States Department of the Interior, in the County of Shasta, State of California. In 1921 this damsite and reservoir basin were well known as suitable sites for such uses, and the feasibility of the sites was the subject of many subsequent reports by various commissions and engineers of the State of California. It was found in the official report of the State of California, prepared by Lester Ready, an outstanding hydro-electric engineer of California, that the Shasta dam project was economically feasible and could be constructed by the state or by a district or by a private company. In 1935 the State of California proposed to undertake the construction of this project, and endeavored to finance this construction by the sale of bonds to the public, however, the lack of investment money due to the severe financial depression existing in 1935, defeated this attempt to raise the necessary funds. The United States Government first took cognizance of the project in the Emergency Relief Appropriation Act of 1935 (49 Stat. 115). The construction of Shasta dam in accordance with the plans as set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, was authorized by the Act of Congress of August 30, 1935 (49 Stat. 1028, 1038). The boundary line of the reservoir was definitely fixed by the margin of the body of water impounded by the 420 foot dam specified in said plans and authorized in said Act of Congress. No change in the height of the specified 420 foot dam was made in any of the subsequent acts of Congress concerning said Central Valley project.

Eight acres of the subject land was above the maximum water surface elevation of said reservoir impounded by said

420 foot dam, which elevation was 1000 feet above sea level. This eight acres of subject land, lying outside of the said fixed boundary line of the reservoir, was later taken by the United States, due to the fact that a 480 foot dam was then completed, which dam raised the water surface of the impounded reservoir to an elevation of 1065 feet above sea level, thereby flooding and submerging practically all of said eight acres of subject land.

Evidence was presented by petitioner, through competent expert witnesses of outstanding reputation, as to the market value of that portion of subject land within the reservoir basin as fixed by its authorized boundary line, and also as to that portion of subject land later taken, which was outside of said authorized reservoir boundary line. This evidence was not heard by the Court of Claims nor by the commissioner of said court, who made the findings of fact, as has been fully set forth in the petition for writ of certiorari filed herein.

III

Assigned Errors as Are Intended to Be Urged

1. The Court of Claims has erred in making a decision based upon the transcript of the evidence, which evidence it did not hear, and upon the report of a commissioner of said court, who heard no evidence, who saw no witnesses and who concluded no taking of testimony, but based his report of the findings of fact solely upon the transcript of the evidence taken at a hearing held before another commissioner of said court, at which hearing the commissioner filing said report was not present.

2. Even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the Court of Claims

has erred in making its decision and judgment as to the market value of subject land taken by the United States, in that it has neglected to include in said market value the special value said subject land had for reservoir purposes.

3. Even if the report of the findings of fact had been made by a commissioner of the Court of Claims who had personally heard the evidence, and the decision of said Court had been made upon said report, the Court of Claims has erred in making its decision and judgment as to the market value of that portion of subject land taken by the United States, lying outside of the authorized reservoir, in that it has neglected to include in said market value the enhanced value of said land, due to its suitability and availability for recreational and resort uses.

IV

Argument

1. It has been held in numerous decisions of this Court, that a decision in any case must, in order to accord with due process of law, be rendered upon the testimony taken in a full and fair hearing and that the findings of fact must be made by the trier of facts, who has seen and heard the witnesses. None of these requirements were met by the Court of Claims in rendering its decision herein, and your petitioner has actually had no hearing in this case whatsoever. In St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, this Court said:

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at

the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

In Morgan v. United States, 298 U.S. 468, 480, this Court said:

"There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (262 U.S. 274). Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

In Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305, this Court said:

"that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, 480, 481; Inter-

> state Commerce Comm'n. v. Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimum requirement. West Ohio Gas Co. v. Public Utilities Comm'n. (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682. Cf. Norwegian Nitrogen Co. v. United States, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In Morgan v. United States, 304 U.S. 1, 14, 15, this Court said:

> "the liberty and property of the citizen shall be protected by the rudimentary elements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an " 'inexorable safeguard'."

In Smith v. Dental Products Co., 168 F. (2d) 516, (C.C.A. 7, 1948), a case in which the facts are almost identical with those in this case, it was held, that where master died after testimony had closed but before he made a report and district court did not see witnesses, the rendition of judgment on basis of a transcript of testimony before master was not in accord with due process, and that district court, in order to afford parties a hearing within contemplation of due process, should have directed a trial de novo before another master or before itself; reference being made to the above cited cases decided by this Court.

2. The Court of Claims concedes that the special value that land has because of its adaptability to a particular

use is properly considered in determining just compensation for its taking, Boom Co. v. Patterson, 98 U.S. 403. The transcript of the evidence herein clearly shows that subject land had this adaptability, and had it long before any use of the land for such purposes, was contemplated by the United States, this fact is undisputed. The Court of Claims, however, states that if there is no reasonable probability that such special value could be realized by anyone other than the expropriating authority, then such special value is not an element to be considered; it relies upon the decision of this Court in Olson v. United States, 292 U.S. 246, to sustain its finding that the reservoir value of plaintiff's land, cannot, therefore, be considered as affecting its market value. Your petitioner does not disagree with the holding of this Court in the Olson case, but wishes to point out that the facts and conditions in said case are entirely dissimilar to those in this case, and the principles set forth in said Olson case are inapplicable in this case. There a large existing lake lying in both the United States and Canada was involved, necessitating the negotiation of a treaty between the United States and Great Britain before any project could be undertaken, this Court quite properly held that the negotiation of such a treaty between two independent nations by anyone other than the expropriating authority was improbable, and therefore, the special value of the land for reservoir use could not be considered in its market value. No such conditions existed in this case, here a well known and readily available reservoir site entirely within the state of California, was open to development by the state, by a district or by a private company. It is conceded by the United States that a private company could finance and build the Shasta Dam project, as was set forth by it in its request for findings of fact submitted to Commissioner Nagle, in the following

statement.[2] "The Pacific Gas and Electric Company is the only possible private power company in Northern California with sufficient capital and distribution system to undertake the Shasta Dam project."

The transcript of the evidence shows that due to the keen competition between said Pacific Gas and Electric Company and the U. S. Bureau of Reclamation in the sale and distribution of electric power throughout northern California, there was a reasonable probability that the said Pacific Gas and Electric Company, at the time of the taking in 1944, would have undertaken and completed the Shasta Dam project. The scarcity of dam and reservoir sites, at the time of the taking in 1944, and the competition between private power companies and the United States Government in the acquisition of such sites is shown to be a definite factor in determining the market value of subject land, by the testimony of an expert witness of outstanding reputation and extensive engineering experience in the development of similar projects in California.

The further decisions in United States ex rel. Tennessee Valley Authority, 319 U.S. 266, 275 and Continental Land Co. v. United States, 88 F. (2d) 104, cert. den., 302 U.S. 715, relied upon by the Court of Claims, are likewise inapplicable in this case, as the facts and conditions in these cases are entirely dissimilar to those in this case.

3. In United States v. Miller, 317 U.S. 369, 374, 376, 378, this Court has established definite rules to be followed in eminent domain proceedings, which rules are especially applicable to the facts and conditions in this case. The

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[2] A request that this statement be included in the certified transcript of the record in this case, as part of the record as is material to the errors assigned, in accordance with the Act of Congress of May 22, 1939 (53 Stat. 752), section (a) of rule 99 of the Court of Claims, and rule 41 of the Rules of this Court, was made to the clerk of said Court of Claims, but said request was neither accepted nor filed by said clerk.

Court of Claims in its decision in this case has not considered at the time of the taking in 1944, the enhanced value of the eight acres of land subject, above and outside of the fixed boundary line of the reservoir authorized by Congress, which land was not, from the beginning of the project included in the necessary lands to be taken. The 420 foot dam fixed and authorized by Congress, limited the elevation of the water surface of the impounded reservoir to an elevation of 1000 feet above sea level, the margin of this water surface accurately determined and fixed the boundary line of the lands necessary for said reservoir. In Kerr v. South Park Commissioners, 117 U.S. 379, the ruling of this Court was, that where the lines of the park had, in the beginning, been fixed, property lying outside the boundaries of the park, and not intended to be taken, would be dissimilar from that lying within it, the one gaining value by proximity and the other gaining nothing from the fact that it was to be taken from its owner. The said eight acres of subject land definitely fall within the category of property lying outside of the lines of the Shasta Dam project at the time the Government was committed to it, by its final and definite authorization of said project by the Act of Congress of August 30, 1937. In United States v. Miller, above, this Court said on page 374;

> "Respondents correctly say that value is to be ascertained as of the date of taking.";

and on page 376 this Court said:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government at a later date, determine to take these

> other lands, it must pay their market value as enhanced by this factor of proximity.'';

and on page 378 this Court repeated and confirmed the ruling in Kerr v. South Park Commissioners, above.

The Court of Claims concedes that a 420 foot dam was specified and authorized by Congress and that the size of the impounded reservoir was increased by the finally constructed 480 foot dam, which raised the water surface elevation of the impounded reservoir to 1065 feet above sea level; however, it decided that as there was only one 480 foot dam constructed, that there was only one project and one taking, and that as said 480 foot dam was worked on continuously until its completion that there were no separate takings, for which reason no enhanced value should be attached to the additional land taken. This decision was made despite the fact that the boundary line of the reservoir had been fixed by the Government, in its final and definite authorization of the project by the Act of Congress of August 30, 1937. If this reasoning of the Court of Claims be correct, it is obvious that any Government Bureau could, by merely increasing the size of a project after it had been fixed and authorized by Congress and constructing said project without interruption, take any amount of adjoining land it desired outside the fixed boundary line, without payment of any enhanced value for said land. Such a taking without the payment of enhanced value would obviously be in direct conflict with the principle of just compensation as set forth in the rulings of this Court, hereinabove cited.

The transcript of the evidence shows that from 1935 to the time of the taking in 1944, the eight acres of subject land outside of the fixed boundary line of the authorized reservoir, had attained, in the minds of all prospective purchasers, who create the market value of land, a special

value for recreational and resort purposes. The adaptability of the said eight acres of land for such purposes and its market value, was set forth in the testimony of a competent expert witness of twenty-eight years experience in buying and selling lands in Shasta County, California, who had seen and examined said land.

Wherefore your petitioner respectfully prays that the judgment of the Court of Claims of the United States be reversed and remanded by this Honorable Court, in order that the report of the findings of fact may be made by a commissioner of said Court of Claims, who has seen and heard the witnesses testify, that the reservoir value may be included in the market value of that portion of subject land inside of the fixed boundary line of the Shasta Dam project, and that the enhanced value may be included in the market value of that portion of subject land outside of the fixed boundary line of said Shasta Dam project, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.